BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

STATUTORY REVIEW OF THE SYSTEM FOR	)	
REGULATING RATES AND CLASSES FOR	)	Docket No. RM2017-3
MARKET DOMINANT PRODUCTS	)	

MOTION OF THE ASSOCIATION FOR POSTAL COMMERCE, ALLIANCE OF NONPROFIT MAILERS, AND MPA—ASSOCIATION OF MAGAZINE MEDIA FOR EARLY TERMINATION OF NON-PUBLIC STATUS OF TWO DOCUMENTS FILED UNDER SEAL
(March 16, 2018)

Pursuant to Rule 3007.31 of the Commission's Rules of Practice, 39 C.F.R. § 3007.31, the Association for Postal Commerce ("PostCom"), Alliance of Nonprofit Mailers ("ANM"), and MPA—Association of Magazine Media ("MPA") respectfully request that the Commission terminate the non-public status of Appendix A to the Postal Service's Initial Comments in Docket No. RM2017-3, filed under seal on March 1, 2018, and Appendix G to the Postal Service's March 20, 2017 comments in the same docket.

The non-public version of Appendix A consists of "two charts projecting the Postal Service's losses and liquidity over five years, assuming the continuation of the current system or, alternatively, the addition of 2 percentage points of supplemental rate authority." *See* USPS, Notice of Filing Non-Public Materials, at 1 (March 1, 2018). The appendix is "an update of Appendix G to the Postal Service's March 20, 2017, comments in this proceeding." *Id.* The Postal Service has stated that it is the only party with a proprietary interest in the information contained in these materials. *See* USPS, Application for Non-Public Treatment of Materials, at 2 (March 20, 2017).

Rather than offer an updated justification for non-public treatment of the March 2018 version of the charts, the Postal Service relied on, and incorporated by reference, its one-year-old application for non-public treatment of Appendix G. *See* USPS, Notice of Filing Non-Public Materials, at 1 (March 1, 2018). The March 2017 application for non-public treatment, however, failed to provide a reasonable basis for non-public classification of the 2017 Appendix G, let alone the 2018 Appendix A. The public interest dictates that the full contents of both appendixes be unsealed.

I. THE POSTAL SERVICE HAS FAILED TO ESTABLISH ANY COMPETITIVE HARM FROM DISCLOSURE.

The PAEA established the basic standard governing the protection of information designated non-public by the Postal Service. "In determining the appropriate degree of confidentiality to be accorded information . . . the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets." 39 U.S.C. § 504(g)(3)(A). To make a prima facie case under this provision, an applicant for non-public treatment "must include a specific and detailed statement setting forth ... [t]he rationale for claiming that the materials are non-public, including the specific statutory basis for the claim, and a statement justifying application of the provision(s)." 39 C.F.R. § 3007.21(c)(1). The statement must contain, among other things, "[p]articular identification of the nature and extent of commercial harm alleged and the likelihood of such harm" and "[a]t least one specific hypothetical, illustrative example of each alleged harm." *Id*., § 3007.21(c)(4), (5).

The Postal Service did not make such a showing for Appendix G last year, and thus has made no such showing for Appendix A. Instead, the Postal Service has offered only the following conclusory assertion:

> With respect to Appendix G, the projections reflect internal judgments and assumptions about various sensitive aspects of the Postal Service's business. The Postal Service does not routinely publicize year-by-year forecasts of its financial condition. Such information *would not be disclosed publicly as a matter of good business practice in the private sector*.

See USPS, Application for Non-Public Treatment of Materials, at 3 (March 20, 2017) (emphasis added).[1] This statement invokes the wrong legal standard and is factually unsupported.

Nondisclosure as a matter of "good business practice in the private sector" is but one factor that informs the analysis of whether commercially sensitive information should be disclosed under the Freedom of Information Act, 5 U.S.C. § 552(b), which 39 U.S.C. § 504(g)(1) incorporates by reference. The standard under which the Commission ultimately decides whether to allow continued non-public treatment of a document initially filed under seal is more demanding. The Commission must balance "the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets." 39 U.S.C. § 504(g)(3)(A). To this end, Commission's rules require a far more detailed threshold showing of likely competitive injury than the Postal Service has made. The Postal Service, when applying for non-public treatment, must provide "[p]articular identification of the nature and extent of commercial harm alleged and the likelihood of such harm". 39 C.F.R. § 3007.21(c)(4). Moreover, the Postal Service must provide "[a]t least one specific hypothetical, illustrative example of each alleged harm." *Id.*, § 3007.21(c)(5).

The Postal Service has failed to identify *any* commercial harm that would result from public disclosure of its 2017 Appendix G or its 2018 Appendix A, let alone provide any

[1] The Postal Service states that Appendix A to its March 1, 2018 Comments in Docket No. RM2017-3 is an update to Appendix G to its March 20, 2017 comments. The Postal Service therefore relies entirely on its March 2017 application for keeping 2017 Appendix G under seal to justify keeping the Postal Service's March 2018 Appendix A under seal.

illustrative examples of such alleged harm. The specific examples of potential commercial harm described in the Postal Service's March 2017 Application all concerned a *different* March 2017 appendix—Appendix C. Appendix C was a 96-page report by a pair of consulting firms, Alvarez & Marsal and the Institute for Supply Management, purportedly evaluating a number of specific opportunities for the Postal Service to reduce its costs or increase its revenues. *See* USPS, Application for Non-Public Treatment of Materials, at 3-5 (March 20, 2017) (beginning each hypothetical with the phrase, "[t]he opportunities identified by A&M are revealed").

The Postal Service's March 2017 request to keep the Alvarez & Marsal report under seal was not unreasonable on its face. Disclosure of the analysis of specific opportunities for cost savings arguably could weaken the Postal Service's bargaining position in negotiating for better terms with its labor unions and suppliers of other goods and services. Likewise, analysis of specific opportunities for new sources of revenue arguably could provide a roadmap for private firms to exploit the same opportunities to the disadvantage of the Postal Service. But disclosure of the charts in March 2017 Appendix G and March 2018 Appendix A would raise none of these competitive concerns.

The values depicted by the figures in the charts are highly aggregated. They reveal only system-wide losses and liquidity projections, with each value aggregated into a single system-wide number, and nothing more. The values reveal nothing about the underlying data, the Postal Service's business strategies, or the disaggregated performance of the Postal Service's market-dominant or competitive products. And there is no way for the public to infer from these aggregate figures any of the individual cost-saving and revenue-enhancement opportunities that the Postal Service might have considered in generating the charts, let alone the monetary value that the Postal Service or its consultants might have assigned to any of those unidentified opportunities. The aggregation removes any competitive threat that might result from public disclosure of the details of the underlying analyses. *Cf.* Presiding Officer's Ruling No. R97-1/17 (Sept. 11, 1997) at 4 (holding that requiring the Postal Service to produce "summary cost, volume and revenue information" only "in aggregate form should allay the Postal Service's concerns").

As a result, the Postal Service has failed to satisfy the threshold "burden of persuasion" (39 C.F.R. § 3007.21(b)) that needed to be satisfied for non-public treatment of the charts in Appendix G to the Postal Service's March 20, 2017 comments or Appendix A to the Postal Service's March 1, 2018 Comments. The two sets of charts should be made public for this reason alone.[2]

II. THE PUBLIC INTEREST IN DISCLOSURE IS SUBSTANTIAL.

Appendix G and Appendix A should be made public because the public interest in public disclosure of the charts is strong. As the Commission knows, the system of regulation proposed in Order No. 4258 would allow the Postal Service to impose rate increases in the range of 30 to 40 percent on market-dominant products (and collect an extra $16 to $24 billion in postage revenue) over five years. The Postal Service, asserting that these extraordinary increases are inadequate, seeks far more. Appendix A provides a substantial part of the Postal Service's asserted support for this claim, just as the predecessor charts in March 2017 Appendix G did for

[2] 39 C.F.R. § 3007.31(c) states that parties moving to unseal a non-public filing may not reply to any response to the motion to unseal "unless the Commission otherwise provides." We reserve the right to seek an opportunity to reply if the Postal Service asserts any new grounds not previously offered for maintaining non-public status for Appendix A and Appendix G. To forbid replies to responses in this circumstance would allow the Postal Service (or any other party seeking nonpublic status) to sandbag other parties by withholding its asserted grounds for non-public treatment from its initial application under § 3007.21, and unveiling those grounds for the first time only in response to a motion under § 3001.31 for termination of non-public status.

the Postal Service's financial claims a year ago. *See* USPS, Notice of Filing Non-Public Materials (March 1, 2018).

The mailing public, and consumers generally, should be allowed to see for themselves the positions that the Postal Service is asking the Commission to accept. If the Appendix remains under seal, then a central issue in the proceeding would effectively be shielded from public scrutiny and, indeed, any Commission analysis of the issue would also be under seal. Such a result cannot be reconciled with the "public interest in maintaining the financial transparency of a government establishment competing in commercial markets." 39 U.S.C. § 504(g)(3)(A). "The PAEA relies on public transparency, in addition to regulation, to achieve its goal of Postal Service accountability." Order No. 96 in Docket No. RM2008-1, *Regulations to Establish Procedure for According Appropriate Confidentiality* (Aug. 13, 2008) at 5.

CONCLUSION

As explained above, the Postal Service has failed to provide any basis for non-public treatment of the charts contained in Appendix A to its March 1, 2018 initial comments or Appendix G to its March 20, 2017 comments. First, the Postal Service has failed to make even a *prima facie* claim of commercial injury, and the highly aggregated nature of the values shown in the charts forecloses any such claim. Second, the public interest in disclosing this information is obvious. Disclosure promote the public goals of transparency and an openness by allowing mailers, consumers and the American public to learn for themselves the magnitude of the financial losses that the Postal Service is projecting to justify the massive rate increases that it seeks to justify in this case. For these reasons, the Commission should issue an order terminating the non-public status of Appendix A to the Postal Service's March 1, 2018 comments.

Respectfully submitted,

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